Supreme Court, U. S.
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Nos. 80-54 & 80-5049

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CLIFFORD E. CLAYTON,
Petitioner & Cross-Respondent,

v.

ITT GILFILLAN,
Respondent & Cross-Petitioner,

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) and its LOCAL 509,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION FOR UAW & its LOCAL 509

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Does a discharged employee's failure to exhaust his internal union remedies, found at trial to be full, fair and adequate, bar his fair representation action against the UAW?

2. A discharged employee's grievance is withdrawn from the contractual procedure, short of arbitration, by low-level union officials. The employee does not attempt his internal union remedies, which are full, fair and adequate. However, had he done so, the employer, even without admission of liability, would still have been *unwilling* to return the grievance to the contractual procedure, had an internal union appeal resulted in reversal of the union officials. Is such an employer, in a subsequent contract action by the employee, entitled to rely on the defense of failure to exhaust internal union remedies?

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BRIEF IN OPPOSITION FOR UAW & its LOCAL 509

The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) and its Local 509,[1] by counsel, respectfully pray that the Court *deny* both the Petition, and the Cross-Petition for Writ of *Certiorari.*

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[1] Hereafter, jointly referred to as the "UAW" or "Union."

OPINIONS BELOW

The opinions below are reported at: *Clayton* v. *ITT Gilfillan, UAW & Local 509*, —— F. 2d —— (9th Cir. 1980), 104 LRRM 2118, 88 CCH Lab. Cas. ¶ 12,009, *amending* —— F. 2d —— (9th Cir. 1979), 102 LRRM 2190, 87 CCH Lab. Cas. ¶ 11,454.[2] As amended, the Circuit Court's opinion reversed in part, and affirmed in part, the unreported decision of the District Court, which entered judgment in favor of defendants ITT Gilfillan and UAW.[3]

COUNTERSTATEMENT OF THE CASE

Clayton was discharged by ITT Gilfillan, in 1975, for violation of a rule against lewd, indecent and immoral behavior in the plant.[4] Local and Regional UAW officials grieved the discharge, but withdrew the grievance short of arbitration, and notified Clayton.[5]

Article 33 of the UAW CONSTITUTION provides a procedure for successive review of such a decision, first by the Local membership, next by the International Executive Board (I.E.B.),[6] and finally by the Convention Appeals Committee (C.A.C.), or, in most types of cases, the Public Review Board (P.R.B.), at appellant's option.[7] The P.R.B. is a body of independent persons, unconnected with the UAW.[8] *See: Baldini* v. *UAW Local 1095*, 581 F.2d 145, 149 (7th Cir. 1978); *Winter* v. *IBT Local 639*, 569 F.2d 146, 151 n. 26 (D.C. Cir.

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[2] *Reprinted* in Appendix to ITT Gilfillan's Petition, hereafter "ITT App."

[3] *Id.*

[4] District Court's Findings of Fact & Conclusions of Law, ¶ 5, ITT App. at 4.

[5] *ibid.*, ¶ 6, ITT App. at 4-5.

[6] Exh. B at 62-66, *reprinted at* R. 240-78.

[7] Exh. B at 58-61, *reprinted at* R. 238-9.

[8] Exh. B at 66, *reprinted at* R. 242.

1977). The C.A.C. is more analogous to a *petit* jury with appellate duties, as it is composed of elected Delegates from the last UAW Convention, chosen by lot.

Article 33 § 12 of the UAW CONSTITUTION requires exhaustion.[9] Clayton stipulated that he did not invoke his remedies under the UAW CONSTITUTION, much less exhaust them.[10] Instead, he sued ITT Gilfillan for breach of contract, and the UAW for breach of the duty of fair representation.[11]

The District Court tried the question of exhaustion of remedies. It found, as a matter of fact, that the remedies were full, fair, adequate, and available to Clayton. It also found that Clayton had been specifically advised of their existence, and had participated in appeals brought by others.[12] No evidence of futility was presented.[13] Judgment was entered in favor of both the UAW and ITT Gilfillan, because Clayton failed to exhaust.[14]

On appeal, the Ninth Circuit's amended opinion affirmed as to the UAW, but reversed as to ITT Gilfillan, holding that, where the employer is unwilling to let an internal union appeal result in the reinstatement of the grievance into the contractual procedure, it cannot use this defense. Instead, it must defend the contract action on its merits.[15]

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[9] The I.E.B. is analogous to the Board of Directors of a corporation.

[10] Findings of Fact & Conclusions of Law, ¶ 7, ITT App. at 5.

[11] *See*: First Amended Complaint, at R. 33.

[12] *ibid.*, ¶'s 8-13, ITT App. at 6-11.

[13] *ibid.*, ¶ 14, ITT App. at 11.

[14] *ibid.*, ¶ 8, ITT App. at 16.

[15] Revised Opinion, hereafter "Rev. Op.", *reprinted at* ITT App. 11-27.

SUMMARY OF ARGUMENT

Certiorari should be denied. There is uniform agreement that an employee must exhaust remedies available under his union constitution, absent futility or inadequacy, before burdening the courts with a fair representation suit.

Likewise, the Circuit's uniform approach is to allow the employer this defense if it is willing to allow the grievance to be reinstated in the grievance and arbitration procedure, without admission of liability, should the internal union review reverse the original decision to withdraw it. In other cases, as here, where the employer is not so willing, the Circuits deny the defense, having the employer, as he prefers, defend the merits of the contract claim.

As to both these issues, the Circuits are not split, nor is there confusion on a significant statutory issue. At most, there is the normal variety of emphasis and language expected in a notoriously "fact specific" area.

ARGUMENT

Thanks to this Court's earlier decisions, the doctrinal underpinnings of the duty of fair representation are not the source of any particular controversy among the Circuits. This is true, as well, of the requirement that the grievant exhaust available internal union remedies. *See, e.g., Baldini* v. *UAW Local 1095*, 581 F. 2d 145 (7th Cir. 1978); *Winter* v. *IBT Local 639*, 569 F. 2d 146, 148 (D.C. Cir. 1977); *Imel* v. *Zohn*, 481 F. 2d 181, 183-4 (10th Cir. 1973); *Rainey* v. *Mo. Utilities Co.*, 596 F.2d 310 (8th Cir. 1979); *Ruzicka* v. *GMC*, 523 F. 2d 306, 311-12 (6th Cir. 1975). The District Courts have discretion to excuse the requirement in appropriate circumstances. *See, e.g., Chambers* v. *IBT Local 839*, 578 F. 2d 375 (8th Cir. 1978).

As to the union, federal courts have required that the remedy be adequate to redress the employee's complaint *against the union*, whether or not a solution to the employee's problems with the employer is possible. This is, of course, the only relief that could be granted against the union in judicial proceedings. Thus, a union cannot be ordered to reemploy the greivant, because, quite simply, it is not the employer. *Baldini, supra*, at 581.

Exhaustion is excused where the employee shows clear futility. Generally, this means that the procedures are obviously unfair, that the internal tribunals are specifically hostile or biased, and so there is no real chance of prevailing on the merits. *Varra* v. *Dillon Co.*, 615 F. 2d 1315 (10th Cir. 1980); *Fristoe* v. *Reynolds Metals Co.*, 615 F. 2d 1209 (9th Cir. 1980); *Chambers, supra; Winter, supra.* A narrow approach to futility is necessary to avoid the exception swallowing the rule, since, to prevail, a fair representation plaintiff must always show arbitrary, hostile, discriminatory, or bad faith conduct by the union. *Vaca* v. *Sipes*, 386 U.S. 171, (1967).

Most fair representation cases involve discharged employees whose grievance is withdrawn from the contractual procedure, by the union, short of arbitration. *Vaca* v. *Sipes, supra.* In such cases, many unions provide some form of internal review of the decision. However, review may not be available for other sorts of dispute. *See: Winter* v. *IBT Local 639*, 569 F. 2d 146, 150-1, *esp.* n. 26 (D.C. Cir. 1977), contrasting the UAW and IBT systems.[16] The form, the areas covered, and the extent of the review varies enormously, depending, as it does,

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[16] The IBT CONSTITUTION, *e.g.*, appears to exclude collective bargaining matters, *Chambers* v. *IBT Local 639*, 578 F. 2d 375 (D.C. Cir. 1978), while including greivance disputes, *Fizer* v. *Safeway Stores*, 586 F. 2d 182 (10th Cir. 1978).

on each union's internal rules and their application. In short, it is no surprise that appellate decisions have tended to be "fact specific" and, for that reason, sometimes confusing.

The approach of the Circuits, however, is uniform, even though the fruition may, on occasion, fall short. There is agreement that the employer lacks standing to assert the union constitution as a contract. *Fizer* v. *Safeway Stores*, 586 F. 2d 182 (10th Cir. 1978); *Keppard* v. *Int'l Harvester*, 581 F. 2d 764; *Winter* v. *IBT Local 639*, 569 F. 2d 146, 150 (D.C. Cir. 1978); *Petersen* v. *Roth Packing Co.*, 461 F. 2d 312, 315 (8th Cir. 1972); *Retana* v. *Apt. Operators Local 14*, 453 F. 2d 1018, 1027 n. 26 (9th Cir. 1972).

No Circuit has refused the employer the defense where it was established that, if the internal appeal reversed the union's decision, reinstitution of the grievance against the Company was possible. *See, e.g., Winter, supra; Harrison* v. *Chrysler Corp.*, 558 F. 2d 1273 (7th Cir. 1977). So the employer like General Motors Corp., Ford, or Chrysler would have the defense because, under the current contract with the UAW, a grievance may be reinstated in the contractual procedure if the employee's internal union appeal succeeds. Here ITT Gilfillan had not agreed to such a provision. It could always have allowed the same result *ad hoc*, case by case, rather than face trial of Clayton's contract claim; but for its own reasons, chose not to.[17] Where an employer has agreed, or is otherwise willing, to allow the grievance to re-enter the procedure, as the result of an internal union appeal, that internal review arguably becomes a sub-part of the con-

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[17] Such an *ad hoc* agreement as to Clayton would not require any admission of liability. The arbitrartor would still have to decide that issue. It would also quickly short-circuit any danger of "collusive" litigation. Indeed, it would avoid litigation entirely, to the easing of the burden on the federal judicial system.

tractual grievance procedure. In that situation, the employer's right to the defense can be justified under *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965). Such an employer's standing as to the defense is quite different from that of an employer, like ITT Gilfillan, with no intention of allowing reinstitution of the grievance. Where the employer refuses the *possibility* of that reinstitution, the Circuits do not allow employer use of the defense. This is understandable, since the employer's choice is litigation over arbitration. It is *not* unreasonable that one who chooses litigation should be required to litigate the merits of the contract issues without further procedural fencing.

Decisions denying the defense to the union, because of inadequacy or futility, and therefore also to the employer, are not at odds with the result below. Nor is it of any great consequence that, on occasion, a Circuit will allow the defense to an employer, without elucidation, in the process of affirming a summary judgment in favor of the union. Such memorandum results evince only sloppy advocacy and an overburdened judiciary, not any reasoned line of cases. *See, e.g.*, the Third Circuit's line: *Dezura* v. *Firestone Tire & Rubber Co.*, 470 F. Supp. 121 (E.D. Pa. 1979), *aff'd mem.* 612 F. 2d 571 (3d Cir. 1979); *Pawlak* v. *IBT*, 444 F. Supp. 807 (M.D. Pa. 1977), *aff'd mem.*, 571 F. 2d 572 (3d Cir. 1978); and *Aldridge* v. *Ludwig-Harold Mfg. Co.*, 385 F. Supp. 695 (E.D. Pa. 1974), *aff'd mem.* 517 F. 2d 1397 (3d Cir. 1975), *cert. denied*, 423 U.S. 937 (1975).[18] The Third Circuit's only

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[18] Perhaps the strangest two cases are *Willetts* v. *Ford Motor Co.*, 583 F. 2d 852 (6th Cir. 1978) and *Geddes* v. *Chrysler Corp.*, 608 F. 2d 261 (6th Cir. 1979), decided by identical panels. *Willetts* was a routine discharge case, where the Court held, without discussion, that Ford could use the defense. This was before the UAW-Ford Agreement allowed reinstatement of the grievance as a result of an internal union appeal. *Geddes* involved a transfer and merger of

considered option holds that the employer may not have the defense. *Brady* v. *T.W.A.*, 401 F. 2d 87 (3rd Cir. 1968), *cert. denied*, 393 U.S. 1048 (1969).[19] The allegedly conflicting cases are simply different factual application of the same overall approach.[20] The differences

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operations. There the Court held that Chrysler could not use the defense. Here again, this case arose before the contract changes allowing reinstatement of grievances. To compound matters, *Geddes* cites and relies on *Willetts* in discussing the UAW's use of the defense, while ignoring it during the discussion of Chrysler's use. The only possible distinction is the nature of the grievance involved. Even so, the best that can be said of the cases is that inadequate scholarship by one panel of a single Circuit does not create a split of the Circuits. Nor does it create a significant federal question.

[19] *Aldridge, supra*, a UAW case, claims to follow *Brady*, despite the inconsistency on the employer's use of the defense. *Pawlak, supra*, appears to be a case where the grievance could still be reinstituted, 444 F. Supp. at 811. *Dezura, supra*, also notes that the defense is only available to the employer where the grievance can be reinstated, 448 F. Supp. 206, 210 (E.D. Pa. 1978). *Neipert* v. *Arthur G. McKee & Co.*, 448 F. Supp. 206, 210 (E.D. Pa. 1978) expressly follows the D.C. Circuit's *Winter*, requiring the possibility of grievance reinstatement before the defense is available to the employer.

[20] The Eighth Circuit holding in *Rainey* v. *Mo. Utilities Co.*, 596 F. 2d 310 (8th Cir. 1979) may be harmonized with *Petersen* v. *Rath Packing Co.*, 461 F. 2d 312 (8th Cir. 1972). In *Petersen*, the Circuit affirmed the District Court's alternative holding that exhaustion of union remedies was generally unavailable as a defense to the Company; and was, on that record, *specifically un*available to *either* defendant because of futility. The case involved sex discrimination in job classifications, and exhaustion would have required the women to present their case for a vote of the local union, where the men outnumbered the women 4-1. *Rainey*, however, involved an individual employee whose claim could have been effec-

asserted by Petitioners are nothing more than the variety of emphasis, phraseology, and attention to detail which must be expected where a body of law must be applied to varying sets of facts. A trip into this factual thicket would not serve any useful purpose.[21]

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tively handled through the union procedures. The Court quotes *Neal* v. *System Board of Adjustment*, 348 F. 2d 722 (8th Cir. 1965), for the general rule "that a plaintiff must exhaust all of the union's available internal remedies, or show an adequate reason for his failure to do so, before he seeks relief against his union in the federal courts." 596 F. 2d at 314, emphasis deleted. Without further explanation, the Circuit affirms the summary dismissal as to all parties. The Court's action is probably explainable as a case where the grievance could be reinstated but this is not clear from the text of the opinion. Here again, inadequate attention to (then) Judge Blackmun's holding in *Neal* by his successors on that bench creates neither a split, nor an important theoretical issue crying for resolution by this Court.

[21] ITT Gilfillan's remaining arguments only ask the Court to reopen long-established rules. The union is not an indispensable party to a breach of contract suit against the employer. The possibility of back seniority as relief does not alter this. If it did, the union would become a necessary party to every § 8(a)(3) discharge proceeding against an employer under the National Labor Relations Act, *as amended*, 29 U.S.C. § 158(a)(3). This would not only be unworkable, it would be contrary to 40 years of precedent under that Act. ITT Gilfillan would have this Court re-examine the settled law of *Czosek* v. *O'Mara*, 397 U.S. 25, 28-30 (1970), and *Vaca* v. *Sipes*, 386 U.S. 171 (1967), that the union and employer may be sued separately, since the claim against each, as well as the remedy, springs from distinct sources, *i.e.*, § 301 of the Labor Management Relations Act, 29 U.S.C § 185, as to the employer, and an implied right in § 9(a) of the National Labor Relations Act, with jurisdiction under 28 U.S.C. § 1337, as to the union.

CONCLUSION

For the foregoing reasons, the Court should *deny* both ITT Gilfillan's Petition, and Clayton's Cross-Petition for *certiorari.* If *certiorari* is nevertheless granted, it should at least be limited to Issue No. 1 in ITT Gilfillan's petition, which, even on Petitioners' view of the caselaw, is the only controversial issue presented.

Respectfully submitted,

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